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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILFRIDO VILLA PEREZ, Defendant and Appellant.	E070265 (Super.Ct.No. RIF152021) OPINION

APPEAL from the Superior Court of Riverside County. Thomas D. Glasser, Judge. (Retired Judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Wilfrido Villa Perez of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] infliction of corporal injury on a spouse (§ 273.5, subd. (a)), and misdemeanor child endangerment (§ 273a, subd. (b)). The trial court sentenced Perez to an aggregate term of four years in state prison. On appeal, Perez contends that (1) the court erred by admitting his daughter's hearsay statements under the exception for prior inconsistent statements; (2) there was insufficient evidence to support the finding that his wife suffered a traumatic condition, an element of infliction of corporal injury on a spouse; and (3) the court erred by failing to instruct the jury on two lesser included offenses. We affirm.

BACKGROUND

I. *Assault with a Deadly Weapon Count*

M.V. is Perez's ex-girlfriend, and P.V. is their daughter. M.V. was living in Mexico at the time of trial in 2018. In 2009, when P.V. was six years old, the couple and P.V. lived in Mead Valley, California. Deputy Maurice Daugherty of the Riverside County Sheriff's Department responded to a domestic violence call at their residence in July 2009. He interviewed P.V. while her mother was at the other end of the house. P.V. told the deputy that she awoke to her parents arguing earlier that morning and saw Perez chase her mother and try to stab her mother with a knife.

P.V. testified that she did not recall the police coming to her house and did not recall making those statements to Deputy Daugherty. Nor did she recall Perez hurting

[1] Further undesignated statutory references are to the Penal Code unless otherwise indicated.

her mother during that time period. P.V. said that she did not remember anything from 2009.

II. *Infliction of Corporal Injury Count*

B.P. was Perez's wife in 2017. In September 2017, B.P. was throwing a 15th birthday party for P.V. Perez missed the party and arrived home at about 9:30 p.m. They argued, and B.P. said that she wanted a divorce. She began to walk out of the bedroom, and Perez grabbed her by the hair. B.P. fell to the floor, and he kicked her with his military boot four or five times, making contact with her stomach, legs, and arms. She stood up and he kicked her again, and when she fell to the floor, he punched her once or twice in the eye. Her phone was on the floor, and she called 911. While B.P. was on the phone, Perez went to P.V.'s room, and the two of them went to the living room. B.P. was also in the living room by that time and had the couple's two-month-old daughter in her arms. Perez kicked B.P. one more time in the stomach and then fled the apartment.

The prosecutor played B.P.'s 911 call for the jury. B.P. was crying and told the 911 operator that her husband was hitting her and she was "all bruised up." She reported that Perez hit her "in front of [her] stepdaughter."

Deputy Salvador Aguirre, Jr., of the Riverside County Sheriff's Department responded to B.P.'s 911 call. B.P. was extremely upset and crying when he arrived. He took photos of her arms, left leg, and face. B.P. testified that the photos of her left arm showed it was "red and bruised" where Perez had kicked her. A photo of her left leg also showed red markings where he had kicked her. Her face was red where he had punched her, and the redness turned into a bruise the next day. Deputy Aguirre described

"redness" but no bruising in the photos of her left arm and said: "Obviously it's broken capillaries that are on the skin. If there's more dark bruising, the darker bruising comes to the top later on." He thought that the redness on her left arm looked like "finger indentations," as if someone had held her arm, not kicked it. He described the photo of her left leg as depicting "slight redness." He would expect to see more than slight redness if someone had been kicked repeatedly with a boot. He did not see any bruising in the photo of her face, but there was redness on her cheeks and forehead. The photo did not reflect injuries that he would expect to see if someone had been punched multiple times in the face.

P.V. testified that, on the night of her birthday party, B.P. yelled angrily and cursed at Perez when he got home. B.P. pushed Perez "really hard," but he did not push her back, yell in response, or hit her. P.V. went to her bedroom, and B.P. and Perez went to another bedroom; P.V. heard them screaming and fighting in the other bedroom. When all three of them moved to the living room, Perez and B.P. continued to fight and yell at each other in the living room. But according to P.V., Perez did not kick or hit B.P.

P.V. felt "mad" and "bad" about B.P. and was "pretty upset with her." She did not want to have any contact with B.P. She did not like B.P. because B.P. was violent. B.P. yelled at her and said bad words to her. B.P. had also hit her more than once. She identified three incidents in which she witnessed B.P. act violently. In the summer of 2016, B.P. yelled curse words at P.V. and tried to hit Perez. B.P. kicked P.V. out of the house after this incident but later invited P.V. to move back. In March 2017, B.P. punched Perez in the face several times and pushed him. And in the summer of 2017,

B.P. hit Perez in the back of the neck with a hammer. Overall, P.V. had seen B.P. act violently toward Perez between five and 10 times. For her part, B.P. did not recall any occasions when she physically harmed Perez in P.V.'s presence.

P.V. did not want Perez to be in trouble. He was her only parent in the United States, and she needed him. She loved Perez, but she would not lie for him.

Perez's brother believed that B.P. was dishonest. She had once asked him to forge someone's signature. He had heard B.P. being violent to P.V. and Perez over the phone. Although he and B.P. were "not on friendly terms," he would not lie to get her in trouble. He also would not lie to help Perez.

DISCUSSION

I. *Admission of P.V.'s Statements to Deputy Daugherty*

Perez contends that the court erred by admitting P.V.'s statements to Deputy Daugherty because they were hearsay and did not fall within the exception for prior inconsistent statements. We reject this contention.

A. *Additional Background*

Mid-trial, Perez moved to exclude P.V.'s statements to Deputy Daugherty in which P.V. described Perez trying to stab M.V. His moving papers argued that the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) barred admission of P.V.'s hearsay statements.[2] Perez asserted that although P.V. was available,

[2] Under *Crawford*, the Sixth Amendment's Confrontation Clause permits the admission of testimonial hearsay only when (1) the declarant is unavailable for trial and

he could not effectively cross-examine her because she did not remember her statements to the deputy. At the hearing on his motion, he also contended that P.V.'s statements did not fall within the hearsay exception for prior inconsistent statements or any other hearsay exception.

Speaking of P.V.'s testimony, the prosecutor responded: "I think that it became very clear during her testimony regarding [B.P.] that she has animus towards [B.P.] and a sense of protection towards her father. That was very clear. So I think defense counsel's assessment of the fact that [P.V.] doesn't remember is true as well. I wouldn't argue with that. That was clear on the stand." The court asked the prosecutor whether she was going to address the merits of Perez's motion, and they had the following exchange:

"[Prosecutor]: I think I said I agree with [defense counsel's] position.

"THE COURT: I'm sorry?

"[Prosecutor]: I agree with [defense counsel's] position. I don't have a substantive argument against it. I think that [defense counsel is] right.

"THE COURT: You think the defense is right on the motion?

"[Prosecutor]: Yes.

"THE COURT: Even though the witness is available?

"[Prosecutor]: Well, I don't think that [P.V.'s] unavailable in the classic sense. I think the fact that she said she can't remember instead of making a different kind of

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(2) the defendant had a prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at pp. 55, 68.)

statement. I do see my difficulty there. That's why I wanted to ask her further questions about her memory."

The prosecutor further explained: "[I]t's unavailability if [P.V.] is truthfully not remembering and not feigning." In part, the prosecutor wanted a chance to establish P.V.'s "bias," which might cause her to be untruthful about whether she remembered things.

The court denied Perez's motion. It reasoned that an inability to recall prior statements was "the functional equivalent of a denial," which arguably "put[] in play the use of prior inconsistent statements." It further reasoned that there was no *Crawford* or confrontation clause issue because P.V. was available for trial and subject to cross-examination about whether she remembered her prior statements.

After the jury returned its verdict, Perez moved to continue his sentencing hearing. Defense counsel wanted more time to research a new trial motion based on the court's admission of P.V.'s statements to Deputy Daugherty. Counsel intended to argue that P.V.'s inability to recollect her prior statements was not inconsistent with her prior statements. The court denied the continuance and noted: "[I]t should be pretty obvious from the transcript of the trial that the testimony of [P.V.] was hostile within the meaning of the Evidence Code to the prosecution. [¶] So there is an argument there. She was clearly a hostile witness to the prosecution. Therefore, her total and complete denial of giving a statement in 2009 could be and was construed as not sincere. Rather, contrived. Rather, hostile to the People. [¶] Stated in the vernacular of trial attorneys, it could be

construed that she rolled on the prosecution. Therefore, her inability to, quote, remember, end quote, the statement in 2009 was not credible."

B. *No Abuse of Discretion*

Hearsay is evidence of an out-of-court statement "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) It generally is inadmissible, but numerous exceptions to the rule exist, including one for prior inconsistent statements. (Evid. Code, §§ 1200, 1235.) Specifically, "[a] witness's prior statement that is inconsistent with his or her testimony is admissible so long as the witness is given the opportunity to explain or deny the statement. (Evid. Code, §§ 770, 1235.)" (*People v. Ledesma* (2006) 39 Cal.4th 641, 710 (*Ledesma*).)

"'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, . . . [w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.'" (*Ledesma, supra,* 39 Cal.4th at p. 711.) "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement." (*People v. Green* (1971) 3 Cal.3d 981, 988.) "'As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]' [Citation.] The requisite finding is implied from the trial court's ruling." (*Ledesma,* at pp. 711-712.) We review the court's rulings on the admission of evidence for abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 859.)

The court did not abuse its discretion here. The record contains a reasonable basis for concluding that P.V.'s claimed lack of memory amounted to deliberate evasion and untruthfulness. P.V. is Perez's minor daughter and understandably loves her father. Perez is her only parent in the United States. She thus had a motive to protect him and feign an inability to recall statements and events that could result in his conviction. (See *Ledesma, supra*, 39 Cal.4th at p. 712 [court had a reasonable basis to conclude that the witness was being evasive, given that she was the defendant's friend and reluctant to testify, and she claimed that listening to or reading her prior statements would not refresh her recollection].) The trial court observed P.V.'s demeanor "and therefore was in the best position to assess the credibility of her claimed nonrecollection." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.) The court implicitly found her not credible when it concluded that P.V.'s claimed lack of memory was the functional equivalent of a denial. And later, when Perez moved to continue his sentencing hearing, the court expressly found P.V. not credible, noting that she was "hostile" to the prosecution. By that time, P.V. had testified that she was upset with B.P. and did not like her. Further, she said that B.P. had been violent toward Perez, not the other way around, contradicting all of the evidence that Perez had hit and kicked B.P. The whole of P.V.'s testimony reinforced the conclusion that she did not want to help the prosecution and wanted to protect Perez.

In urging us to reverse, Perez relies on the prosecutor's purported concession in the trial court, arguing: "Most importantly, the prosecutor did not think [P.V.] was feigning memory loss and agreed with defense counsel's position." But he takes the

prosecutor's comments out of context. The prosecutor agreed that P.V. said she could not remember her prior statements. At the same time, the prosecutor referred to the possibility that P.V. was not being truthful and was feigning her nonrecollection, and she wanted to question P.V. further to establish her bias. The prosecutor did not unequivocally concede that P.V. *truthfully* could not remember her prior statements or Perez's July 2009 assault on her mother. In any event, in ruling on the admissibility of evidence, the court was not bound by the prosecutor's concession.

In short, the court did not abuse its discretion by admitting P.V.'s statements to Deputy Daugherty. There was a reasonable basis to conclude that P.V. was being deliberately evasive at trial, amounting to inconsistency in effect and rendering her 2009 statements admissible as prior inconsistent statements.[3]

II. *Substantial Evidence That B.P. Suffered a Traumatic Condition*

The jury convicted Perez of "willfully inflict[ing] corporal injury [on B.P.] resulting in a traumatic condition." (§ 273.5, subd. (a).) Perez argues that there was insufficient evidence to support the jury's finding of a traumatic condition. We disagree.

The relevant statute, section 273.5, defines traumatic condition expansively. The term "means a condition of the body, such as a wound, or external or internal injury,

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3 Perez also asserts that the court erred by denying his motion for a continuance of his sentencing hearing, which he sought so that he could file a new trial motion based on the claimed evidentiary error. (See § 1181, subd. 5 [authorizing the court to grant a new trial if it "erred in the decision of any question of law arising during the course of the trial"].) Even if the court erred by denying the continuance, the denial did not prejudice Perez. There is no reasonable possibility that his new trial motion would have succeeded, given that the court did not err by admitting P.V.'s 2009 statements to the deputy.

. . . whether of a minor or serious nature, caused by a physical force." (§ 273.5, subd. (d).)[4] "[T]he language 'whether of a minor or serious nature' is simply another way of saying *the injury may be of any variety* or *regardless of the seriousness.*" (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044.) While other felony offenses require greater degrees of harm, the Legislature "clothed persons . . . in intimate relationships with greater protection by requiring less harm to be inflicted before" section 273.5 is violated. (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.) Thus, even minor conditions of the body—like bruising and redness—qualify as a traumatic condition. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085 [evidence of bruising sufficient to show that the victim suffered a traumatic condition]; *People v. Wilkins* (1993) 14 Cal.App.4th 761, 771 [redness on the victim's face and nose, and the victim's statements that the defendant had hit her and that her face and neck were sore, established probable cause to believe that the defendant had violated section 273.5].)

In evaluating claims of insufficient evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence."

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[4] Consistent with this statutory definition, the court instructed the jury: "A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force." (CALCRIM No. 840.)

(*Ibid.*) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We do not reweigh the evidence, reevaluate witnesses' credibility, or resolve evidentiary conflicts. (*Ibid.; People v. Lindberg*, *supra*, at p. 27.)

Substantial evidence supports the jury's finding that B.P. suffered a traumatic condition. B.P. testified that her left arm was red and bruised where Perez had kicked her. The photos of her left arm showed redness and darker discoloration that the jurors reasonably could have determined was bruising. Deputy Aguirre, who took the photos, described the redness as broken capillaries. B.P. also had red markings on her left leg from Perez kicking her, which appeared in the relevant photo, and redness on her face where he punched her, which turned into bruising the next day (so the bruising did not appear in the relevant photo). B.P.'s and the deputy's testimony about redness and bruising and the corroborating photos constitute substantial evidence that she suffered a traumatic condition, even if it entailed only minor injuries.

In arguing to the contrary, Perez contends that the "slight red marks" in the photos do not qualify as a traumatic condition. First, he ignores the evidence that B.P. suffered bruising as well, and he concedes that minor bruising would qualify as a traumatic condition. Second, while bruising might require the application of more force than redness, the statute makes no distinction on that basis. For our purposes, the only question is whether B.P. suffered a condition of the body or injury caused by a physical

force, minor though the condition or injury may be. (§ 273.5, subd. (d).) Substantial evidence established that she did.

Perez also points to conflicts in the evidence, such as Deputy Aguirre's testimony that he did not see bruising in the photos of B.P.'s left arm, or B.P.'s testimony that she was bruised everywhere, even though the photos showed bruising on her arm only. The conflicting evidence does not change our conclusion. We do not reweigh the evidence or reevaluate B.P.'s credibility.

Furthermore, Perez's reliance on *People v. Abrego* (1993) 21 Cal.App.4th 133 (*Abrego*) does not persuade us that the jury's finding was unsupported. *Abrego* is distinguishable. The victim testified that her husband had not injured or bruised her when he slapped her and that she did not feel any pain from the blows. (*Id.* at p. 135.) Although she told the investigating officer that she felt "pain and tenderness" where her husband had hit her, the officer did not observe any injuries. (*Ibid.*) On this record, the court held that there was "no evidence of even a minor injury sufficient to satisfy the statutory definition" of a traumatic condition. (*Id.* at p. 138.) In contrast, here the testimony and photographic evidence disclosed visible injuries.

For these reasons, we reject Perez's substantial evidence challenge.

III. *No Instruction on Lesser Included Offenses*

Perez lastly contends that the court erred by failing to instruct the jury sua sponte on simple assault (§ 240) and simple battery on a spouse (§§ 242, 243, subd. (e)(1)), which are lesser included offenses of infliction of corporal injury on a spouse. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457 [spousal battery a lesser included offense];

People v. Gutierrez, supra, 171 Cal.App.3d at p. 952 [simple assault a lesser included offense].) This contention lacks merit.

Simple battery on a spouse requires that the defendant unlawfully touch his or her spouse in a harmful or offensive manner, but the offense does not require any injury. (§§ 242, 243, subd. (e)(1); CALCRIM No. 841 ["The touching does not have to cause pain or injury of any kind."].) No actual touching is necessary for simple assault. (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) Assault is merely "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) So infliction of corporal injury on a spouse differs from those two offenses in that it requires injury. (*People v. Gutierrez, supra*, 171 Cal.App.3d at p. 952.)

We apply de novo review to determine whether the trial court should have instructed on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) That obligation includes giving instructions on lesser included offenses "when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater." (*People v. Wyatt* (2012) 55 Cal.4th 694, 704.) Conversely, the court need not instruct on a lesser included offense when the evidence is clear that if "'the

defendant is guilty at all, he is guilty of the higher offense.'" (*People v. Berry* (1976) 18 Cal.3d 509, 519.)

Here, the court was not required to instruct the jury on the lesser included offenses. There was no evidence that Perez committed simple assault or spousal battery but not the higher offense, infliction of corporal injury on a spouse. While there was some conflict in the evidence as to whether B.P. suffered bruising, the uncontradicted evidence showed that B.P. suffered red markings or broken capillaries on her left arm and red markings on her left leg. As we have discussed, those minor injuries met the expansive definition of a traumatic condition. The uncontradicted evidence of her injuries necessarily elevated Perez's simple assault or spousal battery to infliction of corporal injury on a spouse. Given this uncontradicted evidence of B.P.'s injuries, the evidence was clear that if Perez was guilty at all, he was guilty of the higher offense. The court therefore did not err by failing to instruct the jury on the lesser included offenses.

DISPOSITION

The judgment is affirmed.

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MENETREZ
J.

We concur:
McKINSTER
Acting P. J.

CODRINGTON
J.